

# SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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## I. INVESTIGATION OF GRIEVANCES: LAWYERS FAILING TO COOPERATE

Since the year 2000, there has been a provision in the procedural rules for attorney disciplinary action that requires lawyers to cooperate with Disciplinary Commission investigations, including a requirement to accept service of process.<sup>1</sup> In order to enforce the lawyer's duty to cooperate, the Indiana Supreme Court created a procedure whereby a non-cooperating lawyer is ordered to show cause why he or she should not be suspended from the practice of law until he or she decides to cooperate with the Disciplinary Commission's demand for information.<sup>2</sup> Even if the lawyer finally decides to cooperate with the

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1.

It shall be the duty of every attorney against whom a grievance is filed under this Section to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules, and when notice is given by registered or certified mail, claim the same in a timely manner either personally or through an authorized agent.

IND. ADMIS. DISC. R. 23(10)(e) (2006).

2.

An attorney who is the subject of an investigation by the Disciplinary Commission may be suspended from the practice of law upon a finding that the attorney has failed to cooperate with the investigation.

- (1) Such a finding may be based upon the attorney's failure to submit a written response to pending allegations of professional misconduct, to accept certified mail from the Disciplinary Commission that is sent to the attorney's official address of record with the Clerk and that requires a written response under this Rule, or to comply with any lawful demand for information made by the Commission or its Executive Secretary in connection with any investigation, including failure to comply with a subpoena issued pursuant to sections 8(d) and 9(f) or unexcused failure to appear at any hearing on the matter under investigation.
- (2) Upon the filing with this Court of a petition authorized by the Commission, the Court shall issue an order directing the attorney to respond within ten (10) days of service of the order and show cause why the attorney should not be immediately suspended for failure to cooperate with the disciplinary process. Service upon the attorney shall be made pursuant to sections 12(g) and (h). The suspension shall be ordered upon this Court's finding that the attorney has failed to cooperate, as outlined in subsection (f)(1), above. An attorney suspended from practice under this subsection shall comply with the requirements of sections 26(b) and (c) of this rule.

Commission, the lawyer will be taxed for costs and a processing fee.<sup>3</sup> Should lawyers neglect to pay those costs and fees, they can be suspended for that conduct as well.<sup>4</sup> Assuming that a lawyer successfully survives the show cause proceeding described above (and continues to have a license in good standing), the lawyer can still face substantive disciplinary action for failing to respond to the Disciplinary Commission's demands for information. Indiana's Rules of Professional Conduct contain a provision identifying a violation of the rules where lawyers fail to respond to the Commission's otherwise lawful demands for information.<sup>5</sup>

By way of background, the Indiana Supreme Court suspended a lawyer from the practice of law for ninety days in September 2005 because of his repeated failures to respond to demands for information from the Disciplinary

- (3) Such suspension shall continue until such time as (a) the Executive Secretary certifies to the Court that the attorney has cooperated with the investigation; (b) the investigation or any related disciplinary proceeding that may arise from the investigation is disposed; or (c) until further order of the Court.
- (4) On motion by the Commission and order of the Court, suspension that lasts for more than six (6) months may be converted into indefinite suspension.

IND. ADMIS. DISC. R. 23(10)(f) (2006).

3. *Id.*

4. *Id.*

- (5) Upon the disposition of any show cause petition filed pursuant to paragraph (f)(2), above, resulting in either dismissal due to the respondent's subsequent cooperation or suspension from the practice of law, the Commission may seek an order reimbursing the Commission in the amount of \$500 plus out-of-pocket expenses for its time and effort in seeking the order in addition to all other costs and expenses provided for by Section 16 of this rule. An attorney who fails to pay the reimbursements, costs, or expenses assessed pursuant to this paragraph by the due date of the annual registration fee required by Admission and Discipline Rule 2(b) shall be subject to an order of suspension from the practice of law pursuant to Indiana Admission and Discipline Rule 2(h), and shall be reinstated only upon paying the outstanding reimbursements, costs and expenses and submitting to the Clerk a written application for reinstatement and payment of an administrative reinstatement fee of two hundred dollars (\$200).

*Id.*

5.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protect by Rule 1.6.

IND. PROF'L CONDUCT R. 8.1 (2006).

Commission. In *In re Clark*,<sup>6</sup> the Disciplinary Commission made two demands for information on the lawyer, and he failed to submit any sort of timely response.<sup>7</sup> He was the subject of two show cause proceedings like that described in Rule 23(10)(f) of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys, but also to the substantive disciplinary violation described in Rule 8.1 of the Indiana Rules of Professional Conduct. The opinion notes that the case was tried to conclusion, and the supreme court made its decision based on the findings of fact submitted by a Hearing Officer.<sup>8</sup> The time involved in getting this respondent lawyer's case to judgment before the court was considerable.

At about the same time the *Clark* decision was handed down in September, the court suspended another lawyer for failing to respond to demands for information from the Disciplinary Commission. In late 2005, South Bend attorney Danny Ray Hill was suspended *indefinitely* after the Disciplinary Commission filed its eighth case against him for failing to cooperate.<sup>9</sup> Approximately a month later, the Disciplinary Commission filed its ninth failure to cooperate case against the respondent.<sup>10</sup> After the ninth case was filed, the court ordered the respondent to appear and show cause as to why he should not be held in contempt. In the court's subsequent opinion, it noted that the respondent had been the subject of more failure to cooperate proceedings than any other lawyer in Indiana.<sup>11</sup> The court then discussed the legal underpinnings of the various categories of suspensions that it employs in regulating the bar. The respondent in *Hill* had originally been suspended on the basis of one who fails to cooperate with an investigation into his or her professional misconduct. After his appearance before the court, however, he was found to be in contempt of the court, and his suspension was converted into one requiring him to go through the formal reinstatement process. The procedure to be followed for, petitioning for, and obtaining reinstatement are spelled out in Indiana Admission and Discipline Rule 23.<sup>12</sup> That process requires that the petitioning lawyer demonstrate a variety of skills and qualities that include demonstrable remorse and overall fitness to return to practice. In addition, it requires the lawyer to obtain a passing score on the Multistate Professional Responsibility Examination (MPRE).<sup>13</sup> In short, it requires a lawyer to meet and exceed the same character

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6. 834 N.E.2d 653 (Ind. 2005).

7. *Id.* at 654-55.

8. *Id.* at 654.

9. *In re Hill*, 840 N.E.2d 316 (Ind. 2006).

10. *Id.* at 317.

11. *Id.*

12. IND. ADMIS. DISC. R. 23(4)(b) (2006). The rule, inter alia, imposes the burden of proof on the petitioning lawyer to show by clear and convincing evidence that he or she is fit to be recommended to the profession and has a proper understanding of the standards imposed on members of the bar. One of the other key elements is a showing of remorse by trying to "make it right" with former clients. *Id.*

13. *Id.*

and fitness requirements needed when first seeking admission to enter the bar. Needless to say, reinstatement is not a “rubber stamp” process.<sup>14</sup> One does not simply file a petition to be reinstated to the bar, then sit back and wait for the new license to arrive in the mail. As with the other cases described herein, the court used this opinion to speak to the bar at large about its expectations of lawyers involved in the disciplinary process.

Unfortunately, we are seeing a limited number of lawyers who do not timely respond to Commission requests for information. The Commission’s requests for information cannot be ignored and to do so is an independent violation of Ind. Professional Conduct Rule 8.1(b). As with the respondent in this case, lawyers who choose to disregard Commission requests will do so at their peril. In the future, we will have far less tolerance for lawyers who fail to cooperate timely with the Commission and, as here, will not hesitate to take significant action.<sup>15</sup>

The lawyer in *Hill* was suspended from the bar indefinitely and will have to clear the hurdles mentioned above before rejoining the practice of law.

## II. ATTORNEY FEES: MEDICAL MALPRACTICE

During the survey period, the Indiana Supreme Court revisited the subject of attorney fees in medical malpractice cases. In *In re Stephens*,<sup>16</sup> the respondent entered into a contingent fee contract with a client in 2001 that contained the following language:

The law limits the Attorneys’ fees to 15% of all sums recovered from the Patient Compensation Fund, though it does not restrict the amount of fees taken from the first \$100,000 of any recovery from the health care providers. The Client(s) agree to pay to the Attorneys as much of the first \$100,000 obtained from the health care providers as is necessary to equal one-third of the total recovery.<sup>17</sup>

In 2002, the lawyer (for reasons not stated in the opinion) had concerns about going forward with the medical malpractice case under the terms of the existing contingent fee contract. He proposed two alternatives to the client. One such option was for the client to pay the fee on an hourly basis. The client declined this option. The second alternative was to continue the representation under the terms of the original contingent fee contract, but the client would have to pay a \$10,000 “retainer” in order to continue to retain the firm’s services.<sup>18</sup> The lawyer

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14. See *In re Gutman*, 599 N.E.2d 604 (Ind. 1992).

15. *In re Hill*, 840 N.E.2d at 319.

16. 851 N.E.2d 1256 (Ind. 2006).

17. *Id.* at 1257.

18. The term *retainer* is undefined in Indiana’s Rules of Professional Conduct. Indeed, it is undefined in most states. The term is not used in Indiana Professional Conduct Rule 1.5 that governs the fees a lawyer may charge nor is it discussed in the rule’s attendant Comment. Although

also required that the \$10,000 payment be nonrefundable.<sup>19</sup> Aside from the primary ethics issue with this fee agreement discussed shortly, the nonrefundable nature of the retainer is a clear violation of Indiana Professional Conduct Rule 1.5(a) as an unreasonable fee.<sup>20</sup> The court's reasoning on these arrangements is clear:

There may be circumstances where a nonrefundable retainer is enforceable, such as where the lawyer is precluded from other representation or where there is guaranteed priority access to the lawyer's advice, but these types of circumstances are not alleged here. *See, Matter of Thonert*, 682 N.E.2d 522, 524 (Ind. 1997). By locking a client to a lawyer with a nonrefundable retainer, the lawyer chills the client's right to terminate the representation.<sup>21</sup>

By 2004, the lawyer and client had a falling out, and the client demanded the return of both her file and the \$10,000 previously paid to the lawyer.<sup>22</sup> He declined to return her money because of the nonrefundable nature of the payment.<sup>23</sup> In 2005, however, he relented (*after* disciplinary action had begun) and paid her the full \$10,000.<sup>24</sup> For purposes of this article, however, the significant feature of *Stephens* is the court's discussion of the structure of the respondent's fee for a medical malpractice case.

Indiana's Medical Malpractice Act<sup>25</sup> governs the procedures by which health care providers<sup>26</sup> can be sued for their professional errors in this state. This work is not intended to be a comprehensive treatise on Indiana's Medical Malpractice Act but some grounding in that area of law is necessary for understanding the significance of *Stephens*. Health Care providers are required to maintain malpractice insurance coverage up to certain monetary levels specified in the Act.<sup>27</sup> When a malpractice plaintiff recovers more than the health care provider's statutory share, the excess amount comes from Indiana's Patient Compensation

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colloquially we think of a retainer as the payment made when the lawyer is initially hired, BLACK'S LAW DICTIONARY 1183 (5th ed. 1979) notes, "it can mean solely the compensation for services to be performed in a specific case." In this instance, the representation was over a year old before the subject came up.

19. *In re Stephens*, 851 N.E.2d at 1257.

20. The court gives its thoughts about non-refundable fee deals at length in *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004).

21. *In re Stephens*, 851 N.E.2d at 1258.

22. *Id.* at 1257.

23. *Id.*

24. *Id.*

25. IND. CODE §§ 34-18-1 to -18 (2004). For purposes of this article, the current citations are used because the relevant concepts in *Stephens* have long been the same.

26. Physicians, nurses, hospitals and many others are all health care providers as that term is defined in Indiana Code § 34-18-2-14 (2004).

27. IND. CODE § 34-18-4-1.

Fund up to a prescribed maximum recovery of \$1.25 million.<sup>28</sup> The Medical Malpractice Act is clear that attorney fees from the fund are capped at fifteen percent of the recovery from the fund.<sup>29</sup> There are no exceptions. Said another way, if a malpractice plaintiff recovers more than the provider's share, their total recovery is made up of two components: the provider's share and the Patient Compensation Fund share. The law is clear that attorneys may not take fees of more than fifteen cents of every dollar that comes from the fund.<sup>30</sup> What about fees taken from the provider's share? The Act is silent as to that portion of the fee.

The 2001 contingent fee agreement in *Stephens* was explicitly structured so that a sliding scale would be applied to the provider's share of the recovery so that he would receive a final fee as close to one-third of the total recovery as mathematically possible.<sup>31</sup> Bear in mind that in this case, the client terminated the respondent's representation and hired another lawyer, so there was no actual recovery to divide according to the fee agreement. The supreme court acknowledged that the Malpractice Act did not restrict the fee portion of the provider's share but found this to be an unreasonable fee under Indiana Professional Conduct Rule 1.5(a).<sup>32</sup> Relying on the holding of a prior case, the

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28. *Id.* § 34-18-14-3. The mechanics of the fund are irrelevant to this Article other than to note that the fund is comprised of surcharges on health care providers and is maintained by the State of Indiana's Department of Insurance. *Id.* §§ 34-18-6-1 to -7.

29. *Id.* § 34-18-18-1.

30. *Id.* The statute also allows an attorney to take fees on a *per diem* basis, but that is irrelevant to this discussion of *Stephens*.

31. *In re Stephens*, 851 N.E.2d 1256, 1257 (Ind. 2006). Using the current limits in the Medical Malpractice Act as an example, assume that a hypothetical plaintiff obtains a maximum recovery of \$1.25 million. If the act didn't exist and a lawyer was free to charge a client a fee of one-third of the total recovery, then the full fee would be \$416,666.67. Since the Act does exist, however, we know the Patient Compensation Fund portion of the recovery is \$1 million so the maximum attorney fee from the fund's share is \$150,000. Using the formula set out in the *Stephens* fee agreement, the lawyer would keep the *entire* provider's share of \$250,000 for a total fee of \$400,000. That is about \$16,000 below where a one-third contingent fee agreement would have otherwise left the lawyer.

32.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

court found that attempting to circumvent the statute capping fees allowed from the Patient Compensation Fund was not proper.<sup>33</sup>

The limitation on fees imposed by IC 34-18-18-1 cannot be overcome by merely manipulating the source of the fees. Regardless of the source of the fee, an attorney's compensation must still meet the reasonableness requirements of Prof. Cond. R. 1.5(a) and the 15% limitation of IC 34-18-18-1.<sup>34</sup>

As a result of his manipulation of the fee contracted for with the client, the court imposed a sanction of a public reprimand on the lawyer.

*Stephens* is the latest in a series of cases that the supreme court has addressed on the subject of attorney fees in malpractice cases. Perhaps the earliest of these was the 1980 case of *Johnson v. St. Vincent Hospital*.<sup>35</sup> *Johnson* was not a disciplinary matter but a case involving the substantive provisions of Indiana's Medical Malpractice Act. Specifically, the lawyers in *Johnson* challenged the constitutionality of the fee limitation provision as a denial of due process and equal protection.<sup>36</sup> The court denied the challenge and reasoned that since the total amount recoverable by an injured patient is limited, the limitation on attorney's fees follows naturally as a means of protecting the already diminished compensation due to claimant and does not violate the due process and equal protection provisions of the Constitution.<sup>37</sup>

Before *Stephens*, the court has had occasion to look at a case very similar to *Stephens*. In *Matter of Benjamin*,<sup>38</sup> a medical malpractice plaintiff signed an agreement with a lawyer who shared space with Benjamin. That contingent fee agreement called for the lawyer to receive forty percent of the "total recovery not to exceed attorney fee of 200,00 [sic]."<sup>39</sup> When Benjamin and the other lawyer parted company, Benjamin kept the client but did not execute a new contingent fee agreement.<sup>40</sup> The provider and the plaintiff eventually reached a settlement for \$100,000 to be paid in two payments of \$50,000 each.<sup>41</sup> The lawyer in

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(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

IND. PROF'L CONDUCT R. 1.5(a) (2006).

33. *In re Stephens*, 851 N.E.2d at 1257 (citing *In re Benjamin*, 718 N.E.2d 1111 (Ind. 1999)).

34. *Id.* at 1257-58.

35. 404 N.E.2d 585 (Ind. 1980).

36. *Id.*

37. *Id.* at 602.

38. 718 N.E.2d 1111 (Ind. 1999).

39. *Id.* at 1112.

40. *Id.* Note that Rule 1.5(c) of the Indiana Rules of Professional Conduct requires the contingent fee agreements be in writing. Benjamin was also disciplined for failing to set out the manner in which the contingent fee would be calculated under the fee agreement. *Id.*

41. *Id.* This was the total statutory amount of the provider's share under the prior version of Indiana Code § 34-18-4-1.

*Benjamin* took \$40,000 of the first \$50,000 payment as his forty percent contingent fee.<sup>42</sup> The court also noted that he took the money without considering the current value of future payments.<sup>43</sup> The respondent thereafter pursued a recovery with the Patient Compensation Fund and obtained a recovery for the client of \$335,000. When the Fund's check arrived, the lawyer kept \$134,000, which was forty percent of the recovery from the Fund's portion of the settlement.<sup>44</sup> The same fifteen percent limitation covered recoveries from the Fund at that time as well as at the time of *Stephens*.<sup>45</sup> Unlike *Stephens*, *Benjamin* actually got the money. He kept a total of \$174,000 out of the total recovery of \$435,000, which was exactly forty percent of the proceeds.<sup>46</sup> After he was informed about the fifteen percent limitation, he offered to return \$23,750, which would have reduced his total fee to approximately thirty-four percent of the whole.<sup>47</sup> The court still found that the respondent charged an unreasonable fee.<sup>48</sup> An important feature of the *Benjamin* opinion (especially when read in conjunction with *Stephens*) is Note 2 that gives some additional insight into the court's reasoning on contingent fees in medical malpractice cases:

Adopting his former partner's interpretation of the original fee agreement, the respondent attempted to retain as his fee \$100,000 of the \$100,000 settlement from the defendant hospital, in addition to 15 percent of the recovery from the Indiana Patient Compensation Fund. We find that approach to be an attempt to circumvent the statute limiting the recovery allowed from the Fund. By retaining as his fee an unreasonable portion of the recovery from the settlement with the hospital, the respondent would have effectively offset the 15 percent limitation on his fee from the Fund recovery.

We note, in any event, that an attorney's written disclosure to the client of the fee and the method by which it is to be determined is of key importance in avoiding disputes over the reasonableness of a fee.<sup>49</sup>

It is against this backdrop that *Stephens* was decided. The court found it "wholly improper" for the lawyer to attempt to circumvent the limit on fees relative to the Patient Compensation Fund by taking an increased percentage (potentially all) of the provider's share of a medical malpractice settlement.<sup>50</sup>

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42. *In re Benjamin*, 718 N.E.2d at 1112.

43. *Id.*

44. *Id.*

45. *Id.* The opinion refers to Indiana Code § 27-12-18-1 which was Indiana's Medical Malpractice Act at the time of the underlying case. The current statute is Indiana Code § 34-18-18-1 and mentioned *infra*.

46. *In re Benjamin*, 718 N.E.2d at 1112.

47. *Id.*

48. *Id.* at 1113.

49. *Id.* at 1113 n.2.

50. *In re Stephens*, 851 N.E.2d 1256, 1258 (Ind. 2006).



They found this part of the fee agreement to be unreasonable and worthy of a public reprimand.<sup>51</sup> It is important for practitioners to note that in neither the *Johnson* case, the *Benjamin* case nor the *Stephens* case did the supreme court explicitly state what it believed a reasonable fee to be from the provider's share of a medical malpractice recovery. A plain reading of the opinions cited makes it clear that taking *all* of the provider's share is, in the court's view, unreasonable. It seems equally clear, however, that the court is not imputing the fifteen percent fee cap from the Patient Compensation Fund share of a recovery onto the provider's share where the legislature has not spoken. Only through some additional pronouncement by the court or the General Assembly will an explicit statement on the attorney fee from the provider's share be actually known beyond the "reasonable fee" language of Rule 1.5(a).<sup>52</sup>

After the opinion in *Stephens* was handed down, the Indiana Trial Lawyers Association moved to intervene in the matter and briefed the question of the reasonable fee requirement as it relates to provider's share of any malpractice recovery. The supreme court had not issued a final order on the intervenor's matter at the time of submission of this survey.<sup>53</sup>

### III. EX PARTE COMMUNICATION WITH JUDGES

The general rule for lawyers has long been Rule 3.5(b) which forbids communication with judicial officers *ex parte* about a pending matter.<sup>54</sup> This kind of misconduct has, in years past, been so prolific so as to be the subject of commentary in prior survey articles.<sup>55</sup> Such communication undermines the fundamental fairness of the litigation process and, as such, has long been an

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51. *Id.*

52. IND. PROF'L CONDUCT R. 1.5(a) (2006).

53. The court's online docket can be found at <http://www.in.gov/ai/law/>.

54.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person during the proceeding unless authority to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment.

(d) engage in conduct intended to disrupt a tribunal.

IND. PROF'L CONDUCT R. 3.5 (2006).

55. See Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477, 1477-81 (2002).

outlawed practice.<sup>56</sup> As noted previously, the majority of disciplinary cases involving *ex parte* communication with a judicial officer involve a family law issue—most commonly a child custody matter and, if one reviews the cases, the common scenario involves child custody matters in a post-decree environment.<sup>57</sup> This kind of conduct became so pernicious that the Supreme Court’s Commission on Judicial Qualifications issued an advisory opinion to judges in 2001.<sup>58</sup> This advisory opinion explained the court’s thinking about the judicial corollary to Rule 3.5 found in Canon 3 of the Code of Judicial Conduct. The Judicial Qualifications Commission spoke on this issue in strong terms and even reprinted the applicable rules that should guide judges’ actions in these circumstances.<sup>59</sup> Clearly, this is a subject about which much has been written in the last several years.

During the survey period, the supreme court imposed a public reprimand on a respondent lawyer in *In re Ettl*.<sup>60</sup> Prior to the lawyer’s involvement in the case, the wife had obtained a protective order against her husband.<sup>61</sup> He violated the order, was arrested and released.<sup>62</sup> A short time thereafter, the wife hired the respondent lawyer to formally pursue the dissolution case.<sup>63</sup> The lawyer then filed a petition to dissolve the marriage and another document, filed concurrently, called a Petition for Provisional Relief and Supervised Visitation.<sup>64</sup> This second document asked for two types of relief: (1) provisional relief including: temporary exclusive custody of their child, temporary exclusive occupancy of the marital home, child support, spousal support, supervised visitation for the father, and (2) an order granting emergency custody.<sup>65</sup> Ettl, the respondent’s attorney, also presented a form order to the court that included language granting all the relief requested in the Petition but, most significant for this discussion, all of which would be awarded without notice to the husband.<sup>66</sup> Bear in mind that this point in time was the outset of the marriage dissolution case. Until there was an order from a trial court, the legal status of the parties was that of husband and wife or, more to the point, father and mother. Ignoring the protective order for

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56. *Id.* at 1479 n.14.

57. By “post-decree environment” the author is referring to a period that is after the actual marriage dissolution decree, property settlement and child custody, visitation and child support orders have been entered. *See, e.g., In re Saint*, 785 N.E.2d 1101 (Ind. 2003); *In re Morton*, 770 N.E.2d 827 (Ind. 2002) (judicial disciplinary action); *In re Warrum*, 724 N.E.2d 1097 (Ind. 2000).

58. Advisory Opinion #1-01 from the Supreme Court Commission on Judicial qualifications. The opinion is reprinted in full as Appendix A to the 2001 professional responsibility survey cited in Kidd, *supra* note 55, at 1489.

59. Kidd, *supra* note 55, at 1489.

60. 851 N.E.2d 1258 (Ind. 2006).

61. *Id.* at 1259.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

a moment, their legal rights with respect to the child were equal. Even after the petition for dissolution and the petition for provisional relief were filed, no change in their legal status with respect to the child existed until there was an order granting a change in favor of one of the parties from the court.

The opinion in *Ettl* is clear that the respondent knew two addresses for the husband (that were not the marital residence) and that those were in the record before the trial court.<sup>67</sup> The opinion is also clear that Ettl did not attempt to give notice to the husband and that he, on behalf of the wife, was seeking an emergency change in the legal custody of the child from joint custody to sole custody.<sup>68</sup> Nowhere in the opinion does the supreme court reveal whether the respondent was successful in getting the trial court to grant the relief sought by the petitions. The mere fact that the written *ex parte* communication was made was sufficient to impose disciplinary sanction on the lawyer in *Ettl*. The court reiterated its reasoning in reaching this decision:

The presumption in every adversarial proceeding is that there is no *ex parte* communication with the judge, and that notice of any communication with the court will be given to all parties. As we recently explained in *In re Anonymous*, 729 N.E.2d 566, 569 (Ind. 2000) (quoting *In re Marek*, 609 N.E.2d 419, 420 (Ind. 1993)):

At the heart of our adversarial system of justice is the opportunity for both sides of a controversy to be fairly heard. “Improper *ex parte* communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. [Such communications] threaten[] not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice.”<sup>69</sup>

Despite having two addresses for the husband, Ettl made no attempt to give the husband notice of the relief he was seeking. Ettl claimed that his statement in the petition that the husband was “at large in the community” satisfied whatever duty of notice might exist to either the husband or the trial court.<sup>70</sup> Obviously, the supreme court did not agree.

What is the lasting lesson of *Ettl*? Unlike the requirements of many other areas of law, a lawyer seeking *ex parte* relief on behalf of a client has a definite and personal role to play in pursuing that relief: “If respondent did indeed have legitimate reasons for not giving notice, Trial Rule 65(B)(2) required him to certify to the court, in writing, his claim that notice should not be given and the

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67. *Id.* at 1260.

68. *Id.*

69. *Id.* The court noted at the end of the opinion, “Despite the statement of the requirements for obtaining a temporary restraining order set out in *In re Anonymous*, 786 N.E.2d 1185 (Ind. 2003), respondent, who acknowledges having a copy of that decision on his desk, did not follow its straightforward requirements.” *Id.* at 1261.

70. *Id.* at 1260-61.

reasons supporting his claim.”<sup>71</sup> Trial Rule 65(B) provides:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) *the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.*<sup>72</sup>

A plain reading of the opinion in *Ettl* reveals that the lawyer did not ask for a temporary restraining order under that name. A review of other cases in this area, however, reveals that the supreme court views these requests for *ex parte* relief as requiring compliance with Trial Rule 65.<sup>73</sup> Note that the rule is explicit in that it requires the affirmation by *the lawyer* that efforts to give notice were or were not made. This requirement makes the lawyer a necessary player in the process whereby litigants seek specific relief without giving notice to the other party. In that way the lawyer, by complying with the requirements of Trial Rule 65, might be viewed as something of a gatekeeper: The client cannot get the *ex parte* relief she seeks without the lawyer’s certification that the request for such relief was handled properly. Again, we do not know from *Ettl* whether the trial judge granted the relief or not but the supreme court is saying in *Ettl* that the absence of the required certification under Trial Rule 65(B) should be a signal to the judge that the request for relief may not be properly before the court and should, therefore, be denied or at least delayed until some inquiry into the notice to the opposing party is made.<sup>74</sup> As noted at the outset of this section, this kind of misconduct by lawyers is pernicious and the supreme court will continue to issue opinions sanctioning lawyers who do not comply with the relatively simply certification process under Trial Rule 65.

#### IV. CONFLICTS OF INTEREST: THE HOT POTATO RULE

During the survey period, the supreme court decided the case of *In re Finderson*.<sup>75</sup> Although the actual decision is a short final order by the court, there are sufficient facts to glean the nature of the violation that led to the imposition of a public reprimand on the respondent lawyer. Client A.S. hired the lawyer to sue B.H. over injuries sustained in an automobile accident. The lawyer

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71. *Id.* at 1261.

72. IND. TRIAL R. 65(b) (2006) (emphasis added).

73. *See supra* note 50.

74. *In re Ettl*, 851 N.E.2d at 1261.

75. 853 N.E.2d 476 (Ind. 2006).

sued B.H. in late 2001. B.H. was involved in another accident thereafter and hired the same lawyer to represent *her* in a claim against another driver. The lawyer did not consult with A.S. about the conflicting representation of B.H. before he undertook the representation. When the lawyer discovered the conflict of interest in representing the two clients, he withdrew from the representation of A.S. who, as it turns out, was incarcerated. Eventually, A.S.'s suit against B.H. was dismissed and the lawyer continued representing B.H. until a favorable settlement of her litigation was obtained. The lawyer in *Finderson* violated Rule 1.7(a) of Indiana's Rules of Professional Conduct and received a public reprimand.<sup>76</sup>

The text of the former Rule 1.7(a) provided,

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relations with the other client; and

(2) each client consents after consultation.<sup>77</sup>

The Comment to that section of the rule was entitled "Loyalty to a Client" and provided in relevant part:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. This, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.<sup>78</sup>

Although not denominated as such in the text of the opinion, the facts in *Finderson* illustrate a set of circumstances that invoke what has come to be colorfully named as the "hot potato rule."<sup>79</sup> The basic iteration of the rule is, "a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."<sup>80</sup> The rule is applied in situations "when a firm has already undertaken concurrent conflicting representations, and seeks to covert one of its current into a former client on the spot, thus avoiding disqualification unless the matter it is handling for the clients are 'substantially related.'"<sup>81</sup> The application of the Rules of Professional Conduct changes

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76. *Id.*

77. IND. PROF'L CONDUCT R. 1.7(a) (2006).

78. IND. PROF'L CONDUCT R. 1.7(a) cmt. (2006).

79. The origin of the term has been credited to a U.S. District Court judge in *Picker International v. Varian Associates*, 670 F. Supp. 1363 (N.D. Ohio 1987), *superseded by Rule as stated in SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp. 863 (S.D. Ohio 2002).

80. *Id.*

81. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.16:302 (1998).

somewhat when a client goes from the status of being a current client to the status of being a former client.<sup>82</sup> The end result of analyzing these rules in light of *Finderson* is that when a lawyer represents conflicting interests between two (or more) current clients, the lawyer is not free to pick which client he or she would like to keep. As noted in *Picker International, infra*, a lawyer can't pick the lucrative client over the not-so-lucrative client.<sup>83</sup> In *Finderson*, the dropped "hot potato" client's case got dismissed while the other client's case eventually resulted in a settlement.<sup>84</sup>

### CONCLUSION

A majority of the 2005 survey was concerned with the Indiana Supreme Court's adoption of the American Bar Association's Ethics 2000 recommendation.<sup>85</sup> No such major rule overhaul was present during the relevant survey period, as it related to the substantive enforcement of Indiana's Rules of Professional Conduct or the procedural rules for pursuing lawyer disciplinary actions in the Rules for Admission to the Bar and the Discipline of Attorneys. The Indiana Supreme Court has addressed ethics matters that appear relatively straightforward on their face but cover much deeper and more intricate issues on closer examination. As cases like *Hill* and *Ettl* illustrate, there are deeper and subtler issues in play that deal with both law office management and bar management functions. *Stephens* deals with a fee issue that may warrant additional review in future survey editions.

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82. See Rule 1.9 of the Indiana Rules of Professional Conduct for the requirements for treatment of conflicts of interest involving former clients.

83. See *supra* note 72.

84. *In re Finderson*, 853 N.E.2d 476 (Ind. 2006).

85. Donald R. Lundberg & Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 38 IND. L. REV. 1255 (2005).